

STATE OF MICHIGAN
COURT OF APPEALS

In re VANHORN/SEBENICK, Minors.

UNPUBLISHED
November 25, 2014

Nos. 321309; 321311
Isabella Circuit Court
Family Division
LC No. 11-003201-NA

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

In these consolidated appeals, respondents K. Sebenick (“respondent-father”) and C. VanHorn (“respondent-mother”) appeal as of right from the trial court’s order terminating their parental rights to the minor children, KJMV and BLS, pursuant to MCL 712A.19b(3)(c)(i), (g), and (i). We affirm.

Respondents have a prior history with the Department of Human Services (DHS) that resulted in the November 2012 termination of their parental rights to two other children, SAV, the daughter of respondent-mother, and LBS, respondents’ common son, pursuant to MCL 712A.19b(3)(c)(i) and (g). All four children were the subject of the child protection proceeding that led to the termination of respondents’ parental rights to SAV and ELS. The conditions that led to the children’s adjudication included a lack of stable and appropriate housing. Respondents frequently moved and their home was filthy and covered with dog feces. In addition, respondent-mother failed to protect SAV from her brother, a known sex offender, resulting in the sexual abuse of that child. Respondents were offered services, but they were hostile to caseworkers and did not benefit from the services during the 20-month period their children remained in foster care. Following a termination hearing in October and November 2012, the trial court found that statutory grounds for termination were established with respect to all four children, and concluded that termination of respondents’ parental rights was in the best interests of SAV and ELS, but found that termination was not in the best interests of KJMV and BLS because of the bond that existed between them and respondents. The trial court relied on testimony from Shawn Larry, respondents’ counselor, to conclude that respondents should be afforded services for another six months.¹

¹ This Court affirmed the trial court’s decision to terminate respondents’ parental rights to SAV and ELS in *In re VanHorn/Sebenick*, unpublished opinion per curiam of the Court of Appeals issued October 31, 2013 (Docket Nos. 313616, 313635, 313636).

Additional services were thereafter provided by the DHS and other service providers. The DHS caseworker opined that respondents failed to benefit from these additional services. In January 2013, respondents obtained a two-bedroom home and were still in the home at the time of the second termination proceeding. However, the condition of the home remained unsafe for the return of the children. During various visits, workers observed cigarette butts, tools, dishes, food, and bleach on the floor or in areas accessible to a child. Respondents also failed to prepare a budget and received two utility shut-off notices. Respondents' participation in the Wraparound program was terminated for lack of progress. Additionally, DHS workers indicated that respondents were not engaged in visitation and did not demonstrate follow through with discipline. The children's counselor and attachment evaluator recommended termination of respondents' parental rights, citing the lack of attachment to the children, their need for permanency after nearly three years in foster care, and the psychological trauma to the children that would result if they were removed from the foster parents and siblings. Conversely, Larry opposed termination and continued to opine that respondents had made progress, but she could not recommend a timeframe for the children's return to respondents' home. At the conclusion of the termination hearing, the trial court again found that statutory grounds for termination had been established by clear and convincing evidence, and also found that termination of respondents' parental rights was in the best interests of KJMV and BLS.

I. DOCKET NO. 321309

Respondent-father first argues that the trial court clearly erred in finding that the statutory bases for termination were established. We disagree. "To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *Id.*; see also MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Laster*, 303 Mich App 485, 491; 845 NW2d 540 (2013) (citation omitted).

The petition requested termination of respondent-father's parental rights pursuant to the following provisions of MCL 712A.19b(3):

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

“[O]nly one statutory ground for termination must be established for each parent[.]” *In re Laster*, 303 Mich App at 495.

The trial court held that there was “no question” that § 19b(3)(i) was established because it presided over the prior termination proceeding involving SAV and ELS. Although respondent-father was not the biological father of SAV, he was the natural father of ELS, and he does not contest on appeal that § 19b(3)(i) was established by clear and convincing evidence. The trial court’s determination that a statutory ground for termination was established with respect to respondent-father may be affirmed on this ground alone. *In re Utrera*, 281 Mich App 1, 24; 761 NW2d 253 (2008). Nonetheless, we agree that termination was also warranted pursuant to §§ 19b(3)(c)(i) and (g).

Respondent-father asserts that §§ 19b(3)(c)(i) and (g) were not established by clear and convincing evidence because he obtained housing, regularly attended visitation and the visits were appropriate, his home was generally safe and clean, he benefitted from services as evidenced by Larry’s testimony, and the video exhibits at trial demonstrated his bond with the children.

Although Larry testified favorably for respondent-father, clear and convincing evidence demonstrated that termination of his parental rights was appropriate pursuant to § 19b(3)(c)(i). A principal impediment to allowing the children to return to respondent-father’s care was the lack of stable housing with appropriate individuals. To his credit, respondent-father obtained a trailer home with two bedrooms in January 2013, and he continued to reside in this same home at the time of the second termination proceeding in February 2014. However, the DHS caseworker testified that the condition of the home was unsafe and unsuitable for children. During visits, the worker frequently found cigarette butts, dishes with food, and tools on or near the floor. On one occasion, a jar labeled peanut butter actually contained bleach and was on a shelf within reach of a child. During some visits, the house was unkempt. On one visit, hair clippings were observed on the floor and were still present during the next visit. The Wraparound facilitator found the home to be generally clean and safe for her visits, but the Wraparound program was terminated because of a lack of progress. Although respondent-father established and maintained the home, the goal of creating a budget and timely paying bills was not satisfied. The Wraparound facilitator opined that the service providers were working harder than the parents, who were not invested. Respondent-father exhibited hostility toward the service providers and walked out of meetings to calm down.

A psychological evaluation indicated that respondent-father suffered from “hostile attribution bias,” which was the tendency to perceive things in a negative way, and it presented a major barrier to respond to and benefit from services. Although maintaining housing was an indication of stability, Dr. Thomas Olson testified that the failure to maintain the home free from hazards demonstrated a lack of benefit from treatment and presented reason to be concerned for a child’s safety. Similarly, the children’s counselor and attachment evaluator testified that there

was a lack of attachment between the children and respondent-father. The DHS observers of the visitation indicated that respondent-father was not engaged with his children. He would end the visits early by instructing the children to clean up and spent time in the bathroom on his phone. The children's counselor testified that the children referred to the foster parents as their parents and would suffer from the separation with their siblings whose rights had been terminated.

Larry contradicted the testimony of the DHS service providers. She testified that respondent-father benefited from services. However, she did not recommend the return of the children to the home and failed to delineate a timeframe for the children's unsupervised return to respondent-father's care. At the conclusion of the second termination proceeding, the children had been in care for three years.

To the extent that the testimony of Larry and other service providers conflicted, this Court gives due regard to the opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011); see also MCR 2.613(C); MCR 3.902(A). Moreover, satisfaction of terms of an agency agreement or case service plan does not necessarily warrant return of a child. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). Rather, "benefiting from the services [is] an inherent and necessary part of the compliance with the case service plan." *Id.* at 677.

At the first termination proceeding, the trial court found that statutory grounds for termination had been established, but the court declined to terminate respondents' parental rights to KJMV and BLS because of the apparent bond between those children and respondents. However, the trial court also noted that Larry had testified that respondent-father was making progress, and she needed six more months of counseling with him. The first termination decision was rendered in November 2012. At the second termination proceeding held in February 2014, Larry was still unable to recommend an unsupervised return of the children. Further, although Larry's observation of the visitations indicated that respondent-father had made great strides in his parenting, these conclusions were not echoed, but rather contradicted, by the DHS workers. The trial court did not give credence to Larry's testimony, and deference must be given to the trial court's assessment of the credibility of the witnesses. *In re Ellis*, 294 Mich App at 33.

The evidence also satisfied § 19b(3)(g). Although respondent-father had obtained a home, he did not demonstrate that it could be maintained in a safe and suitable manner. He received two shut-off notices while the case was pending, and the heat had been shut off during one visit by service providers. The caseworker learned that only three payments had been made on a utility bill. Because respondent-father never submitted a budget to the DHS, it was unclear whether he could financially afford the home over time. Respondent father's prior residence had dog feces throughout the home. Respondent-father did not have a pet in his current home, but dirty dishes, food, and cigarette butts were observed on the floor, and screwdrivers, wrenches and bleach were within reach of a child. Despite respondent-father's assertion that he was engaged in parenting during visitation, DHS service providers questioned the supervision of the children. During the attachment assessment, respondent-father was in the waiting area with BLS. A co-worker of the attachment evaluator indicated that respondent-father did not supervise the child, and the worker remained in the area to ensure that nothing would happen to the child. During visits, DHS service providers also noted that respondent-father was often in the bathroom looking at his phone instead of engaging the children. This lack of supervision or interest in the

children, coupled with the conditions of the home, demonstrate that respondent-father had not benefitted from services and could not provide proper care or custody within a reasonable time in light of the fact that the children had been in care for three years. Therefore, the trial court did not clearly err in finding that the statutory grounds for termination were supported by clear and convincing evidence. *Moss*, 301 Mich App at 80.

Respondent-father next argues that the trial court clearly erred in finding that termination of his parental rights was in the children's best interests. We disagree. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *Id.* at 90. "We review a trial court's decision regarding a child's best interests for clear error." *Laster*, 303 Mich App at 496.

Once a statutory ground for termination has been proven, the trial court must determine whether petitioner has proven by a preponderance of the evidence that termination is in the child's best interests. MCL 712A.19b(5); *Moss*, 301 Mich App at 90. The factors to consider include the respondent's past history, psychological evaluations, parenting techniques during parenting time, domestic violence, the age of the child, visitation and meaningful contact, family bond, participation in treatment plan and counseling, and the foster environment and potential for adoption. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001). The child's need for permanency, stability, and finality is also a consideration. *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

The trial court reviewed the testimony of the psychological providers who concluded that it would not be safe for the children to return to respondent-father's care and that the children were not attached to respondent-father. The children had no recollection of respondent-father as a caregiver in light of their age when removed and the three years spent in foster care. The foster placement allowed the children to be in the same home with their siblings who had been adopted, and the foster family expressed an interest in also adopting KJMV and BLS. The trial court concluded that respondent-father failed to benefit from the services provided and it would be incredibly damaging to return the children to respondent-father.

In light of the record, the decision to terminate respondent-father's parental rights is not clearly erroneous. Respondent-father's psychological analysis found that his hostility and negative perception created a major barrier to respond to and benefit from services. The psychological evaluations of the children through play therapy and attachment assessment provided that respondent-father was not viewed as a caregiver, but as a visitor whom they played with. The observations by DHS workers during visitation indicated that respondent-father was not engaged in supervising, disciplining, and attending to the children. Wraparound services were terminated for a lack of progress, demonstrating that respondent-father was not benefiting from services. The children needed permanency, stability, and finality after being in foster care for three years. The trial court did not clearly err in deciding that termination of respondent-father's parental rights was in the children's best interests.

II. DOCKET NO. 321311

Respondent-mother argues that reversal is required because the DHS failed to provide psychiatric services for her "undisputed" diagnosis of post-traumatic stress disorder (PTSD), and

failed to pay for her medication. We disagree. The contention that reasonable services were not offered effectively constitutes a challenge to the sufficiency of the evidence. See *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

“[T]he court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child’s life, physical health, or mental well-being.” MCL 712A.19a(5). But the state may not fail to involve or evaluate the respondent and then premise termination of parental rights in part on the respondent’s failure to comply with the service plan. *In re Mason*, 486 Mich 142, 159; 782 NW2d 747 (2010). “While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered.” *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Contrary to what respondent-mother asserts, it was not “undisputed” that she suffered from PTSD. Although the diagnosis may have been made by two evaluators, Larry did not conclude that respondent-mother suffered from PTSD. As respondent-mother’s counselor, visitation observer, and parenting counselor, Larry expended the most amount of time with her. Nonetheless, Larry testified that a diagnosis of PTSD was unwarranted because she saw no evidence of PTSD when treating respondent-mother. Therefore, medication for PTSD was also not recommended. Larry opined that she was qualified to treat an individual with PTSD, and the counseling that respondent-mother received was appropriate for her condition. Additionally, respondent-mother received multiple evaluations, and it was not apparent from the lower court record that treatment by a psychiatrist was a necessary service. Although a psychologist may not prescribe medication, the evaluator from Community Mental Health acknowledged that medication was prescribed by respondent-mother’s nurse practitioner.

On appeal, respondent-mother also claims that the DHS inappropriately refused to pay for her medication. According to the Community Mental Health report, respondent-mother stated that she now had a resource to pay for her medication. Furthermore, respondent-mother was given information regarding an entity from which she could request assistance in paying for her medication. Finally, the cost of the medication was \$12, and it was suggested that respondent-mother save \$3 a week by reducing her cigarette and soda use. The record does not support respondent-mother’s contention that she was deprived of an essential service and medication.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Patrick M. Meter